1968

Ogden City v. Wm. P. Stephens, Isabelle L. Stephens and J. B. Marsh : Reply Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

OGDEN CITY, a corporation,
Plaintiff and Respondent,
- vs. -
WILLIAM P. STEPHENS, ISABELLE L. STEPHENS and J. B. MARSH,
Defendants and Appellants.

Case No. 11106

REPLY BRIEF

Appeal from the Judgment of the District Court of Weber County, Utah
The Honorable John G. Wahlquist, District Judge

MILTON A. OMAN and
H. JAMES CLEGG
Seventh Floor, Continental Bank Bldg.
Salt Lake City, Utah
Attorneys for Defendants and Appellants

CARL SMITH
Ogden, Utah
527 Municipal Building
Attorneys for Plaintiff and Respondent

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THE NOTICE OF APPEAL WAS TIMELY FILED

Following trial of the action, counsel for appellants prepared and submitted to the court proposed Findings of Fact and Conclusions of Law, and Judgment. The originals of these documents were sent to the court for approval and signing and copies were sent to counsel for respondent. Within a few days, counsel for respondent mailed an unconformed and undated Judgment on Verdict and Final Order of Condemnation to counsel for appellants. About ten days later, counsel for appellants received from respondent unconformed copies of Findings of Fact and Conclusions of Law with a cover letter stating in part: "Findings of Fact and Conclusions of Law *are being submitted* which incorporate part of the

provisions you submitted. Copies are forwarded herewith *for your inspection.*" (R. 75 Exh. "A") (Emphasis added.)

Counsel for appellants believed that, because both sides had submitted Findings, Conclusions and Judgments, and because he was informed that the court was out of state, that the court had taken all such papers under advisement until its return. (R. 72)

On or about November 10, 1967, Cecil E. Tucker, the court reporter, discussed appellants' intent to appeal with their counsel. At that time, Mr. Tucker stated that the Judgment may have been entered. Appellants' counsel immediately telephoned the Weber County Clerk of Court and was informed that, according to the minute book, the Findings, Conclusions and Judgment had not been entered. Counsel requested verification from the court file and was informed that the file had been removed for photostating and that the minute entries would correctly show all filings made. (R. 72)

Counsel was required to go to Nebraska to prepare a lawsuit, and, upon returning, again contacted the Weber County Clerk who at that time informed him that Judgment had been entered. Counsel requested certified copies which were supplied November 28, 1967. (R. 72)

Counsel for appellants studied the Findings, Conclusions and Judgment and noted that the Judgment was dated October 11, 1967, and filed October 13, 1967, (R. 67) and that the Findings and Conclusions, although signed October 20, 1967, were not filed until November 21, 1967. (R. 70)

Upon ascertaining these facts, on December 6, 1967, appellants' counsel moved the court for and was granted its Order extending the time for appeal and immediately filed Notice of Appeal with the required fee. (R. 73, 74)

Rule 73(a), Utah Rules of Civil Procedure, provides in relevant part:

> When an appeal is permitted from a District Court to the Supreme Court, the time within which an appeal may be taken shall be one month from the entry of the judgment appealed from unless a shorter time is provided by law, except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the Judgment, the District Court in any action may extend the time for appeal not exceeding one month from the expiration of the original time herein described.

Appellants submit that because the Judgment is based upon and integrally related to the Findings of Fact and Conclusions of Law, the filing of those papers on

November 21, 1967, extended the time for filing the Notice of Appeal until December 21, 1967, fifteen days after the actual filing. The customary sequence is pointed out in Rule 52, Utah Rules of Civil Procedure, applicable in a condemnation suit since the only issue for the jury was the amount of damage sustained:

> (a) In all actions tried upon the facts without a jury or with an advisory jury, the court shall, unless the same are waived, find the facts specially and state separately its Conclusions of Law thereon and direct the entry of the appropriate Judgment. . . .

In cases decided before adoption of the current rules, the Findings necessarily had to precede and support the Judgment. *Kahn v. Central Smelting Company,* 2 Utah 371; *Fisher v. Emerson,* 15 Utah 517, 50 P 619 (1897); *Billings v. Parkins,* 17 Utah 22, 53 P. 730 (1898). As stated in *Fisher v. Emerson,* supra, "the making and filing of the findings and conclusions was a part of, and must precede the entry of judgment."

Rule 73 specifically provides that the time for filing Notice of Appeal may be extended for excusable neglect of counsel. In this instance, counsel for appellants was assured by the clerk of court that the Judgment had not been filed, and, even had he gone to Ogden, could not have examined the file itself since it was being photostated. While respondent's counsel now states his intention was to give Notice of the signing and filing of Judgment by his certificate of mailing dated October 9,

1967, the enclosed paper was undated and unconformed; further, the form of the mailing certificate is identical to that used when a proposed Judgment or Order is submitted to a court for consideration. By his cover letter, counsel stated:

> If there are any objections to any of the figures, please advise immediately . . ."

which further inferred that the Judgment had not been signed and filed, but that it was merely being proposed subject to correction by the court and counsel. The import of his cover letter dated October 17, 1967, is similar, informing that Findings and Conclusions were then being submitted and that copies were enclosed for inspection.

Counsel for appellants cannot deny that Judgment was filed by the Clerk of Court on October 13, 1967. However, he did not learn of said entry, despite reasonable attempts, until November 28, 1967. His neglect in failing to so learn, under the circumstances, was excusable, and the court has jurisdiction to hear and dispose of this appeal. *Cf. Anderson v. Anderson,* 3 Utah 2d 277, 282 P.2d 845 (1955).

Respectfully submitted,

MILTON A. OMAN and
H. JAMES CLEGG
Seventh Floor Continental
Bank Building
Salt Lake City, Utah
Attorneys for Defendants
and Appellants